STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2005
V CEDRIC PIPES, Defendant-Appellant.	No. 247718 Wayne Circuit Court LC No. 02-005202-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V JULIAN DALE KEY, Defendant-Appellant.	No. 247719 Wayne Circuit Court LC No. 02-005202-01

Before: Meter, P.J., and Bandstra and Borrello, JJ.

METER, J. (*concurring in part and dissenting in part*).

I respectfully dissent with regard to the issue of separate trials or separate juries. In all other respects, I concur in the majority's opinion. I would affirm defendants' convictions and sentences.

In considering whether the trial court committed an error requiring reversal in failing to grant defendants their requests for separate trials or separate juries, the key factors, in my opinion, are the offers of proof presented by defendants in which they indicated that they would testify at trial. The cases of *Crawford v Washington*, 541 US 36, 68-69; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Bruton v United States*, 391 US 123, 135-136; 88 S Ct 1620; 20 L Ed 2d 476 (1968), pertain to situations in which a codefendant's incriminating testimony or confession is introduced and the codefendant *does not testify at trial and thus cannot be cross-examined. Crawford* and *Bruton* prohibit the introduction of such testimony or such a confession because it would violate the defendant's constitutional right to confront the witnesses against him. *Crawford, supra* at 68-69; *Bruton, supra* at 135-136.

Here, the court was asked to make a ruling based on the offers of proof it had before it, and these offers of proof indicated that defendants would indeed testify at trial.[1] Accordingly, the trial court properly concluded that there would be no violation of the *Bruton* rule.[2] Essentially, by requesting separate trials or separate juries and at the same time acknowledging that they intended to testify at trial, defendants waived their rights to claim error with regard to the issue of separate trials or separate juries. The trial court proceeded with a lengthy trial, on the final day of which defendants decided not to testify. I simply cannot agree that we should invalidate the trial and the convictions because defendants eventually changed their minds about whether they would testify. Defendants most certainly retained the *right* not to testify; however, they waived their ability to "cry foul" (based on their failure to testify) with regard to the issue of separate trials or separate juries.

The situation invites application of the well-known doctrine that a defendant "may not harbor error as an appellate parachute." See *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002). In other words, I do not believe that a defendant may make a particular offer of proof and then be entitled to reversal simply because he decides, well into trial, to revoke the offer of proof.[3]

I would affirm these cases in their entirety.

/s/ Patrick M. Meter

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[1] If either defendant had indicated that he would not testify at trial under certain circumstances or if either defendant had equivocated with regard to the issue, then I would concur in the reversal of this case.

[2] I note that the *Crawford* decision was released after the trial in this case had already taken place. Therefore, the trial court did not mention *Crawford* in making its rulings.

[3] Moreover, the fact that prosecutor does not make a "waiver" argument in his appellate briefs does not preclude this Court from finding such a waiver. Indeed, the prosecutor does make the general argument that the issue of separate trials or separate juries does not require reversal, and the "waiver" argument is simply one facet of this issue. I find an analogy to the doctrine that "[w]here the trial court reaches the right result for the wrong reason, this Court will not reverse." See *People v Brake*, 208 Mich App 233, 242 n 2; 527 NW2d 56 (1994). In other words, I believe that if the prosecutor argues for the correct outcome, but bases his argument on inappropriate reasons, this court may nonetheless reach the correct outcome by relying on *appropriate* reasons, as long as all the necessary facts are apparent in the record.